

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION**

GUERRA & MOORE, LTD., L.L.P.	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO. 7:11-cv-299
	§	
MARCO A. CANTU, DEBTOR,	§	
LAW OFFICE OF MARK A. CANTU,	§	
P.L.L.C., AYSSA CANTU and	§	
SANDRA DIAZ,	§	
Defendants	§	

PLAINTIFF'S MOTION FOR WRIT OF ASSISTANCE

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Guerra & Moore, Ltd, LLP, Plaintiff, and file this their Motion for Writ of Assistance, and in support of its objection would respectfully show to the Court as follows:

1. On July 27, 2017, the Court issued an Order of Judicial Foreclosure [Doc. 212] applicable to 809 Sycamore, McAllen, Texas 78501, more particularly described as:

Lot Nine (9), Block Four (4), Highland Park, an addition to the City of McAllen, Hidalgo County, Texas, as per plat map or plot thereof, recorded in Volume 10, Page 12, Map Records, Hidalgo County, Texas.

("the Property"). On August 22, 2017, the U.S. Marshals service served a Writ of Execution upon the record titleholder of the Property, and upon the Property itself (See, Exhibits A & B).

2. Upon service of the Writ of Execution by the Marshals, the Property was brought *in custodia legis* of the Court issuing the order or judgment. *Wilkerson v. Goree*, 18 F.2d 455, 456 (5th Cir. 1927), *cert den.*, 274 U.S. 761 (1927); *Glenn v. Hollums*, 80 F.2d 555, 557 (5th Cir. 1935). Texas practice does not require the levying officer to enter the

property; endorsement of the writ of execution is sufficient for levy. Tex. R. Civ. P. 639. Therefore, upon service of the Writ of Execution, the Property came into custody of the Court by way of the Marshals.

3. On August 23, 2017, Plaintiff mailed a letter via certified mail, return receipt requested to Mark Cantu, Roxanne Cantu and Sandra Diaz. Plaintiff e-mailed the same letter to Mark Cantu, and Attorney Kelly McKinnis. (See, Exhibit C). Said letter demanded that the occupants of the Property vacate within three (3) days, per the requirements of Tex. Prop. Code ann. §22.005 (providing 3 days notice for a tenant at sufferance to vacate). “A tenant at sufferance is ‘[a] tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired.’” *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 915 (Tex. 2013), *quoting* BLACK'S LAW DICTIONARY 1605 (9th ed.2009). The Cantus are mere holdovers in the Property having no further interest in same upon service of the Writ.

4. As of August 29, 2017, Mark and Roxanne Cantu remain in possession of the Property, and refuse to leave. The Cantus are interfering with the Court's custody over the Property.

5. Pursuant to Fed. R. Civ. P. 70(d), “on application by a party who obtains a judgment or order of possession, the clerk **must** issue a writ of execution or assistance.” (emphasis added).

6. Plaintiff moves that the Court issue an order directing the U.S. District Clerk to issue a Writ of Assistance directing the U.S. Marshals Service to eject all persons occupying the Property, using all force as is necessary to accomplish such task, and put Plaintiff (or the Marshals) in possession of such Property.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that the Court grant the relief herein sought, and all such other and further relief, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

GUERRA LAW GROUP, PLLC

4201 North McColl Rd.

McAllen, Texas 78504

(956) 618-3000 Phone

(956) 686-4200 Fax

By: _____/s/ David J. Lumber_____

David J. Lumber

Texas Bar No. 24002504

S.D. Tex. No. 22085

**ATTORNEY FOR PLAINTIFF GUERRA &
MOORE, LTD, LLP**

CERTIFICATE OF CONFERENCE

On August 29, 2017, I conferred with Kelly McKinnis regarding the relief sought in this motion, pursuant to the S.D. Tex. Local R., and Defendants are OPPOSED to the relief sought herein. Defendant Cantu did not respond.

_____/s/David J. Lumber_____
David J. Lumber

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure, a true copy of this instrument has been served via ecf service and/or regular U.S. mail on the 29th day of August, 2017, as follows:

_____/s/David J. Lumber_____
David J. Lumber

Kelly K. McKinnis
612 Nolana, Suite 240
McAllen, TX 78504

Diann Bartek
1400 N. McColl Rd.
McAllen, Texas 78501

Mark Cantu
801 W. Nolana, Suite 320
McAllen, Texas 78504

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Plaintiff

v.

**MARCO A. CANTU, DEBTOR,
LAW OFFICE OF MARK A. CANTU,
P.L.L.C., AYSSA CANTU and
SANDRA DIAZ,
Defendants**

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CIVIL ACTION NO. 7:11-cv-299

AFFIDAVIT OF DAVID J. LUMBER

BEFORE ME, the undersigned authority, on this day personally appeared David J. Lumber, known by me to be the person whose name is subscribed to this Affidavit, and after having been by me first duly sworn, upon his oath, stated as follows:

“My name is David J. Lumber. I am over eighteen (18) years of age. I have never been adjudicated to be incompetent. I have never been convicted of a felony or crime involving moral turpitude. The facts stated in this Affidavit are based upon my own personal knowledge (except where indicated), and they are true. I have been continuously licensed to practice law in the State of Texas since 1997, and am also licensed to practice before the United States District Courts for the Northern, Southern, Western and Eastern Districts of Texas. I am also licensed to practice before the United States Court of Appeals for the Fifth Circuit.

All documents attached to the foregoing motion are true and correct copies of the originals. On August 29, 2017, I contacted Attorney Kelly McKinnis to determine whether the Cantus remained in the Property. Kelly McKinnis informed me that Mark and Roxanne Cantu remain in possession of the Property.

FURTHER YOUR AFFIANT SAYETH NAUGHT. “

_____/s/ David J. Lumber_____
David J. Lumber

Subscribed and sworn to before me on the _29th___ day of _Aug._____, 2017,
to certify which witness my hand and official seal.

_____/s/ Martha Lopez_____
Notary Public, State of Texas